



BRB No. 17-0166

RALPH B. BRONSTROP)

Claimant-Respondent)

v.)

SERVICE EMPLOYEES)
INTERNATIONAL, INCORPORATED)

and)

INSURANCE COMPANY OF THE STATE)
OF PENNSYLVANIA)

Employer/Carrier-)
Petitioners)

DATE ISSUED: Nov. 27, 2017

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Collin D. Seipel and Lisa N. Linney (Brown Sims), Houston, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-LDA-00209) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On February 27, 2007, while working for employer in Al Assad, Iraq, claimant jumped off the roof of a two-story building to avoid incoming fire from an insurgent

attack. Upon landing, he experienced pain in his hips, knees and pelvis. Claimant was diagnosed with avascular necrosis and returned home to Houston for treatment. Dr. Matthews performed hip replacement surgeries on claimant's right hip on August 16, 2007, and on his left hip on March 19, 2009. Claimant stated that since the surgeries he has constant pain and a loss of equilibrium, that he has been very inactive, and as a result has progressively gained a significant amount of weight and become depressed.¹

Claimant has not worked since he returned to the United States. Employer voluntarily paid claimant temporary total disability benefits until its vocational expert, Susan Rapant, identified potential work for claimant in labor market surveys dated April 22, 2013, and October 28, 2015, and Dr. Khalifa opined, on May 30, 2013, that claimant was at maximum medical improvement. Employer thus adjusted its payment of disability benefits from total to partial to reflect claimant's ability to perform suitable alternate work as of April 22, 2013. Claimant, believing he remained incapable of performing any work, filed a claim under the Act alleging that the February 27, 2007 work accident caused injuries to his hips, legs, back, ankles, and body generally, including weight gain to the point of morbid obesity, and a worsening of his psychological condition. CXs 2, 3. Employer controverted the claim, asserting that claimant is capable of working with light-duty restrictions and, thus, is no longer totally disabled. Employer conceded that claimant's hip injuries are work-related but averred that claimant's alleged secondary injuries, i.e., his weight gain, psychological condition, and back, leg and ankle pain, are not related to the work injury.

The administrative law judge stated that claimant is not entitled to the Section 20(a) presumption that his weight gain, psychological condition, and back, leg and ankle pain are work-related. 33 U.S.C. §920(a). He nevertheless determined that these secondary conditions are compensable as they naturally or unavoidably resulted from claimant's February 27, 2007 work accident/injury. 33 U.S.C. §902(2); Decision and Order at 22-27. The administrative law judge awarded claimant ongoing temporary total disability benefits from February 27, 2007, based on the combined effects of all his injuries. 33 U.S.C. §908(b). He also awarded claimant permanent partial disability benefits for separate 26 percent impairments to claimant's left and right legs for the hip injuries, 33 U.S.C. §908(c)(2),² as well as medical benefits for his weight gain,

¹Claimant's wife, the mother of his two young children, died in a car crash on November 3, 2007.

²The administrative law judge noted, however, that the scheduled awards of permanent partial disability benefits are subsumed in claimant's total disability award for his February 27, 2007 injuries. Decision and Order at 35.

psychological condition, and back, leg and ankle pain, in addition to the hip conditions. 33 U.S.C. §907.

On appeal, employer challenges the administrative law judge's finding that claimant's back, leg and ankle pain is secondary to his work-related hip injuries and, thus, compensable.³ Claimant has not filed a response brief.

Employer contends the administrative law judge's finding that claimant's radiating back pain is the natural or unavoidable result of his work-related hip condition is not based on any actual medical evidence but is instead based on an improper inference the administrative law judge drew from extra-record evidence. Employer states that the record does not contain any medical opinion evidence tying claimant's back pain to his work-related hip condition and/or the treatment therefor. Employer also asserts that the administrative law judge improperly substituted his opinion for that of orthopedic surgeon Dr. Kaldis, who unequivocally stated that claimant's radiating leg numbness and lower back pain are unrelated to the workplace incident.

An employer is liable for the natural or unavoidable results of a claimant's original work injury. 33 U.S.C. §902(2); *see generally Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988); *Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987), *aff'd mem.*, 901 F.2d 1112 (5th Cir. 1990). In cases arising within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, such as this one, it is the claimant's burden to "present substantial evidence that the secondary condition naturally or unavoidably resulted from the covered injury," without benefit of the Section 20(a) presumption. *Ins. Co. of the State of Pennsylvania v. Director, OWCP [Vickers]*, 713 F.3d 779, 786, 47 BRBS 19, 23(CRT) (5th Cir. 2013); *see Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008); *contra Metro Machine Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017). Substantial evidence is "that relevant evidence—more than a scintilla but less than a preponderance—that would cause a reasonable person to accept the fact-finding." *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 228, 46 BRBS 25, 27(CRT) (5th Cir. 2012).

The record, as the administrative law judge found and employer correctly notes, contains no opinion evidence from any physician explicitly tying claimant's radiating

³The administrative law judge's findings relating to claimant's bilateral hip condition, and that claimant's weight gain and psychological condition are compensable as secondary injuries, are affirmed as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

back pain to his bilateral hip condition. Nevertheless, the administrative law judge permissibly found that claimant's medical records, when "reviewed in the aggregate" show "a clear link between claimant's hip injury and his leg, back and ankle pain." Decision and Order at 27. In reaching this conclusion, the administrative law judge found it noteworthy that claimant's medical records "were devoid of leg, back and ankle complaints" prior to his hip injury.⁴ *Id.* at 26; *see also* EXs 26 at 22; 27 at 38; EX 9. Claimant testified at his depositions that his complaints of gluteal and thigh pain occurred after his 2007 right hip replacement surgery. *See* EX 26 at 26; *see also* EX 27 at 66. Claimant thereafter developed back pain that continued through the time of the formal hearing in December 2015. CX 1 at 11, 15, 27, 33, 41; EXs 9, 16, 27 at 69; HT at 25, 30.

The administrative law judge relied on claimant's testimony that he had a 1.5 inch differential in leg length resulting from the right hip surgery on August 16, 2007; his right leg was longer than his left. HT at 25; Decision and Order at 27. The medical reports do not explicitly record this fact, but claimant was diagnosed with an "antalgic gait" by Dr. Jones, JX 2 at 2-3, and a "Trendelenburg gait" by Dr. Page, CX 1 at 9, in the period between the two hip surgeries. In a report dated July 7, 2008, Dr. Jones wrote that claimant reported discomfort in his right leg due to "waddling" and some pain in his low back. EX 12 at 3. In her report dated July 10, 2008, Dr. Page diagnosed claimant with atrophy of the right gluteus medius muscle and a Trendelenburg gait, which she attributed to claimant's first hip surgery. CX 1 at 8-9. Dr. Page also opined that claimant's abnormal gait "probably explains the chronic spasm of the iliotibial band." *Id.*⁵ Dr. Page's October 23, 2008 report states that claimant had obtained a left heel lift. EX 10 at 14; *see also* CX 1 at 16. On February 19, 2009, Dr. Page reported that claimant had an abnormal gait, atrophy of gluteus medius muscle, hip pain and debility. EX 10 at 21.

The administrative law judge, based on claimant's testimony, found that the leg length differential was corrected by the March 19, 2009 left hip surgery. Decision and Order at 26 (citing HT at 25). Nonetheless, claimant continued to have gait issues with

⁴In this respect, claimant testified at his deposition that his general state of health was "very well" before he went to Iraq, EX 26 at 22; *see also* EX 27 at 38, which is supported by claimant's pre-employment screening and physical examination from 2005, which reflects that claimant was not having any musculoskeletal problems at that time and that, among other things, his spine and knees were all "within normal limits," notwithstanding that claimant reported having prior back pain. EX 9.

⁵Claimant testified that, before the second surgery, his abnormal gait "caused real bad atrophy in my IT bands," which he described as "bands that run from the outside of your knee caps up to your hips." HT at 25-26.

corresponding pain. *See* EX 10 at 31-34. Dr. Page noted in April 2010 that claimant's abnormal gait was markedly improved, but in August 2010 that claimant had an abnormal gait with hip pain and intermittent numbness in his thighs. CX 1 at 21, 24. In 2011, Dr. Khalifa noted that claimant had complaints of bilateral hip and lower back pain; claimant told Dr. Khalifa that the pain radiated down his buttocks and up his spine. Dr. Khalifa stated that claimant tested positive for bilateral iliopsoas muscle tightness. *Id.* at 25-27. In both 2011 and 2013, Dr. Khalifa also diagnosed claimant with bilateral sacroiliac joints dysfunction and mild facet dysfunction with discomfort at L3-4 and L4-5 on the right side. *Id.* at 27, 44. Claimant stated, during a Pain Management Functional Capacity Evaluation dated November 14, 2012, that he continued to have low back pain and hip pain that radiated to his ankles. EX 15. The administrative law judge noted that on October 15, 2015, Dr. Kaldis diagnosed radiating pain, numbness and low back pain, albeit unrelated to claimant's work injury. EX 16. Claimant testified that Drs. Page, Killiam, and Khalifa attributed his back pain to his hip surgery. HT at 121-122.

In concluding that claimant met his burden of establishing that his radiating back pain resulted from the work-related injuries, the administrative law judge found:

Hip replacement surgery is a traumatic procedure. It includes incising and splitting the gluteus, dislocating the hip, and using a bone saw to remove the head of the femur which led to atrophy of the gluteus and a 1.5" differential in leg length. Logically, Claimant's shorter leg affected his gait which in turn caused weakness in his hip abductor muscles, used for stabilization, causing further use of his lower back to compensate the loss of balance. In addition to lower back pain, compensation methods for the abnormal gait place stress on the hips, knees, ankles, and feet. Dr. Khalifa diagnosed significant bilateral iliopsoas muscles tightness. The iliopsoas muscles connect the vertebrae of the lumbar spine, hip flexor, and femur. Based on the foregoing, I find the weight of the evidence establishes Claimant's leg, back, and ankle pain are causally related to his employment injury.

Decision and Order at 27.⁶

⁶The surgical procedures were described in the operative reports admitted into evidence. CX 1 at 3-4, 18-19. The administrative law judge apparently used outside reference materials to identify the terms "Trendelenburg gait" and "iliopsoas structure." Decision and Order at 9, 10, 27. Employer does not dispute the accuracy of the definitions used by the administrative law judge. Thus, any error in the administrative law judge's failure to give the parties notice of his use of an outside source or to identify that source is harmless error.

The Board must uphold the administrative law judge's findings of fact and inferences drawn if they are rational, supported by substantial evidence, and consistent with law. *Bis Salamis, Inc. v. Director, OWCP* [Meeks], 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016); *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT). It is well established that the Board does not have the authority to engage in a *de novo* review of the evidence or to substitute its views for those of the administrative law judge merely because other conclusions and inferences could have been drawn from the evidence. *Id.*; see also *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 287, 34 BRBS 96, 97(CRT) (5th Cir. 2000); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944, 25 BRBS 78, 80(CRT) (5th Cir. 1991). Rather, the administrative law judge is exclusively empowered to evaluate and weigh the evidence, and he may choose between reasonable inferences drawn therefrom. See *Meeks*, 819 F.3d at 130, 50 BRBS at 37(CRT) (holding that the Board "improperly undervalued" the administrative law judge's credibility determinations and thus erred in overturning the administrative law judge's inference drawn from those determinations); see also *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). In this case, the objective diagnoses of Drs. Page, Khalifa and Kaldis regarding the existence of claimant's radiating pain and the medical treatment he underwent for his bilateral hip condition,⁷ in conjunction with the timing of claimant's complaints, constitute substantial evidence supporting the administrative law judge's conclusion that claimant's back pain is causally related to his work-related bilateral hip injuries and the treatment therefor. *Meeks*, 819 F.3d 116, 50 BRBS 29(CRT); *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT).

In addition, we reject employer's contention that the administrative law judge erred in rejecting Dr. Kaldis's opinion that claimant's back pain is not related to the work injuries. In weighing the evidence, an administrative law judge "may accept or reject the conclusions of experts and is not required to accept the opinion or theory of a medical expert that contradicts [his] findings based on common sense," so long as his findings are supported by substantial evidence. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 189, 26 BRBS 111, 113(CRT) (5th Cir. 1992) (quoting *Atlantic Marine v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981)); see also *Hullingshorst Industries, Inc. v. Carroll*, 650 F.2d 750, 759-760, 14 BRBS 373, 380 (5th Cir. 1981), *cert. denied*, 454

⁷Furthermore, Dr. Killiam, in a September 23, 2014 Work Capacity Evaluation, stated that claimant's morbid obesity due to inactivity caused by severe hip pain is now causing him to have chronic back pain (due to degeneration of the spine) and ankle pain (due to arthritis). CX 1 at 47. Employer does not dispute the administrative law judge's finding that claimant's obesity is work-related. Thus, Dr. Killiam's statement further bolsters the administrative law judge's conclusion that claimant's leg, back and ankle pain is the natural or unavoidable result of the work-related bilateral hip condition.

U.S. 1163 (1982) (the administrative law judge is entitled to weigh the evidence and “to draw from that evidence the inferences he deems most reasonable in light of the evidence as a whole and the common sense of the situation.”). In this case, the administrative law judge acted within his discretion in rejecting Dr. Kaldis’s causation opinion as speculative and not sufficiently explained; we affirm this conclusion as it is rational and supported by substantial evidence.⁸ *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91, 24 BRBS 46, 48CRT) (5th Cir. 1990) (the administrative law judge “can accept any part of an expert's testimony; he may reject it completely.”). Consequently, we affirm the administrative law judge’s award of benefits for claimant’s back, leg and ankle pain. *See generally Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002).

Accordingly, the administrative law judge’s Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

⁸Moreover, we reject employer’s contention that the administrative law judge’s decision does not comport with the Administrative Procedure Act. *See generally H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).